NO. 86 1651

In the Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE SHEDRICK,
Petitioner/Appellant,

VS.

DOROTHY D. DONNELLY, ET AL
Defendants/Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether a contract between a labor union and a school board may prohibit the right to counsel at a preetermination hearing of a teacher employee; and whether such a contractual provision is constitutionally invalid.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO.

EUGENE SHEDRICK,
Petitioner/Appellant,

VS.

DOROTHY D. DONNELLY, ET AL
Defendants/Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The instant application for a writ of certiorari or review is filed herein by Eugene Shedrick, petitioner, following the decision of the Honorable U.S. Court of Appeals, Fifth Circuit, rendered on January 27, 1987 affirming the prior judgment of the Honorable U.S. District Court for the Eastern District of Louisiana, Division "D".

No application for re-hearing was filed.

LOWER COURT OPINIONS

The case was tried to a judge on the question of whether or not the plaintiff-apellant was entitled to be

reinstated as a teacher employee because of failure to grant a timely tenure hearing and because of failure to permit him to have retained counsel at the pretermination hearing. Thereafter, the trial court held that the requirements of constitutional due process was satisfied and that the teacher did not have the right to have counsel represent him at the pretermination hearing because the union contract prohibited it. Copy of the decision of the trial court is annexed hereto as Exhibit "A". Copy of the decree of the Fifth Circuit is annexed hereto as Exhibit "B".

JURISDICTION

Jurisdiction of this Honorable Court is invoked under Title 28 U.S. Code, Section 1254 and Section 1651, seeking to review the judgment of the Honorable United States Court of Appeals, Fifth Circuit, Handed sown on January 27, 1987. This application for a writ of review is timely under the provisions of 28 U.S. Code, Section 2101(c).

PRINCIPLES AND STATUTES INVOLVED

The principles involved herein are those enunciated by *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980) and the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Eugene Shedrick, a duly certified teacher in the Jefferson Parish Public School System, with a record of service of some eighteen (18) years, was suspended without pay as of January 7, 1986, by the Superintendent of

Jefferson Parish Public Schools. At that time, the Superintendent claimed that he was entitled to act pursuant to Louisiana law (apparently L.S.A.-R.S. 17:417) and complainant thereafter filed a complaint to be reinstated in the U.S. District Court, Eastern District of Louisiana, for violation of the due process requirements.

Appellant contended that the Parish Superintendent improperly acted under R.S. 17:417 which permits the Parish Superintendent to withhold the salary of the teacher until the teacher properly performs his duties in this respect. Appellant further contended that since he had been suspended and ordered off the campus of the school where he was employed, it was impossible for him to perform the said duties.

Furthermore, appellant contended that in the pretermination hearing which occurred on or about January 22, 1986, that he was entitled to legal counsel, and that the posttermination hearing for the tenured teacher which occurred on February 27, 1986, May 22, 1986, and June 23, 1986, were not sufficiently prompt to be timely so as to comply with the requirements of due process.

Although appellant contends that he should not have been terminated without pay on January 7, 1986, that he does not fit R.S. 17:417, the statute under which he was terminated, and that he was subsequently denied on January 22, 1986, as well as the timeliness of the posttermination hearing, the serious question involved herein is whether appellant was entitled to counsel at the pretermination hearing on January 22, 1986.

If plaintiff was entitled to counsel at that hearing, then he should have been reinstated with pay from January

7, 1986, until June 23, 1986, when he was subsequently terminated as a result of the tenure hearing before the Jefferson Parish School Board.

In the union contract between Jefferson Federation of Teachers and the Jefferson Parish School Board, in pretermination hearings the right to counsel in denied. The contractual provision in question states:

> "A. At any conference at which it is stated to a teacher that his dismissal (other than for reduction-in-force) or suspension is to be recommended, the teacher may request that the conference be reasonably adjourned (not to exceed three (3) hours unless an emergency otherwise dictates) to permit the teacher to secure the assistance of another teacher or a Federation representative (*other than legal connsel*). Such representative may advise the teacher, but shall not directly participate in the conference unless all participating parties agree that the representative may assume the rule of spokesperson for the teacher or otherwise participate in such conference. The representative at the conslusion of the conference may make a brief (not to exceed five minutes, unless all participating parties otherwise agree) oral statement on the teacher's behalf. (Emphasis supplied). (R. p. 96).
>
> "B. An administrative conference form shall remain inthe teacher's file at the school, while a Special Conference form shall be placed in the teacher's personnel file in the Central Office. However, at times it may be necessary for the building principal to send administrative conference forms as supporting documentation to a special conference form. In these circumstances, the teacher will be so notified."

After Shedrick was terminated without pay he was prohibited from returning to the school campus; thus, he was unable to properly perform his duties as is required under L.S.A.-R.S. 17:417 where there is a termination without pay prior to a tenure hearing. L.S.A.-R.S. 17:417 provides:

> "Teachers shall faithfully enforce the school courses of study and the regulations prescribed in pursuance of law; and if any teacher wilfully refuses or neglects to comply with such requirements, the parish superintendent shall withhold the salary of such teacher until the teacher properly performs his duties in such respect."

The U.S. Court of Appeals, Fifth Circuit, affirmed the judgment of the trial court on January 27, 1987. This application for a writ of certiorari or review now follows.

ARGUMENT

The narrow point at issue is whether the union contract with the Jefferson Parish School Board which prohibits a teacher from having counsel at a pretermination hearing is constitutionally valid. The trial court and the court of appeals found that the pretermination hearing of January 22, 1986, without counsel was proper. The basis of the holding was that the union contract with Jefferson Federation of Teachers prohibited counsel's presence at the pretermination hearing. We respectfully submit that the union contract which prohibits the right to counsel at a pretermination hearing is constitutionally invalid.

In *Riggins*, citing *King v. University of Minnesota*,

774 F.2d 224, (8th Cir. 1985), quoting *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126, (8th Cir. 1975), cert. den. 106 S.Ct. 1491 (1986), the court states that there are four requirements of due process not including the opportunity to cross examine or confront witnesses, in the discharge of tenured professor from a state university, which are as follows:

> "1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
>
> 2) notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges;
>
> 3) a reasonable time and opportunity to present testimony in his or her own defense; and
>
> 4) a hearing before an impartial board or tribunal."

See also *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985).

As can be seen from the above quotation, there appears to be no requirement for counsel's presence for the hearing. We believe that the failure of the court to mention counsel is truly a situation where the right to counsel should not be prohibited. We don't believe that the court meant to imply that a union contract which prohibits the teacher from having legal counsel present at the pretermination hearing in constitutionally valid.

The contractual provision which clearly prevents counsel for the teacher from being present is what is claimed to be invalid herein. We would liken the loss of the

property right or salary of which Shedrick was relieved as a result of the pretermination hearing to be as significant as the loss of welfare benefits in the matter of *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970). In that case the Court stated:

> " 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 64, 77 L.Ed. 158 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he sodesires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR §205.10, 34 Fed. Reg. 1144 (1969); 45 CFR §220.25, 34 Fed. Reg. 13595 (1969)."

The ruling herein appears to be diametrically opposed to the holding of the Fifth Circuit Court of Appeals in *Potashnick v. Port City Construction Co.,* 609 F.2d 1101 (5th Cir. 1980), cert. den. 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d (1980). In the *Potashnick* case, the Court of Appeals held that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment Sue Process. The Court stated:

> "Although there do not appear to be any civil cases on this point, the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the

concept of fifth amendment due process. See, e.g., Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925). The right develops out of the principle that notice and hearing are preliminary steps essential to the passing of an enforceable judgment and that they econstitute basic elements of the constitutional requirement of due process of law. Mulane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 70 S.Ct. 652, 94 L.Ed. 865 (1950); Powell v. Alabama, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Historically and in practice, the right to a hearing has always included the right to the aid of counsel when desired and provided by the party asserting the right. Powell v. Alabama, 287 U.S. 45, 68, 53 S.Ct. 55,77 L.Ed. 158 (1932). 'If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.' 287 U.S. at 69, 53 S.Ct. at 64 (emphasis added); accord, Roberts v. Anderson, 66 F.2d 874 (10th Cir. 1933); Rex Investigative and Patrol Agency, Inc. v. Collura, 329 F.Supp. 696, 699 (E.D. N.Y. 1971)."

See also *Moseley v. St. Louis Southwestern Railway*, 634 F.2d 942 (5th Cir. 1981).

The narrow holding of the instant case conflicts with the narrow holding of *Potashnick* and *Moseley*, as to right to counsel in civil litigation. We respectfully submit the instant case would provide a sound basis to clarifying the right of a party to be represented by counsel in a civil proceeding.

We are aware of the fact that the Attorney General of the United States is now seeking to limit the right to counsel in criminal cases under the *Miranda* rule, We are also aware of the fact that the right to counsel in criminal cases is what is guaranteed under the constitution; and this is a civil case as distinguished from a criminal case. However, we also believe that a contractual provision by a union with a governing authority such as the school board which prohibits the right to counsel at a conference or pretermination hearing cannot withstand constitutional scrutiny.

The narrow point at issue herein is whether the plaintiff has the right to counsel in a civil context. We do not contend that he is guaranteed counsel by the governing authority; however, we do believe that he should have that right to retain counsel to represent him at the pretermination hearing. The contractual rule between the fefferson federation of Teachers and the Jefferson Parish School Board prohibits the plaintiff's right to retain counsel; and that is the rule which is challenged herein. We respectfully submit that such a contractual provision does not comport with due process under the Fifth Amendment, considering the expressions in the case law.

REASONS FOR GRANTING THE WRIT

The question presented is whether the contract between union and an employer may eliminate an employee's right to counsel in a pretermination hearing. We respectfully submit that the right to counsel is so basic a right that a contractual elimination thereof should be struck down as invalid. We are aware of the fact that various statutes permit individual employees to be given notice of hearings and

the right to participate in them in person or by counsel. See for example 45 U.S.C. §153(j), pertaining to the Railway Adjustment Board. However, we know of no absolute requirement and prohibition of counsel in any hearing in any litigated decision, other than the instant case wherein we present that narrow issue for review.

CONCLUSION

In conclusion, we respectfully submit that the contractual provision in the union contract between the Jefferson Federation of Teachers and the Jefferson Parish School Board should be stricken with nullity, and that in due course, petitioner should be reinstated with pay up until the time of the result of the formal tenure hearing as specified hereinabove.

Respectfully submitted,

GREENBERG & DALLAM
848 Second Street
P. O. Box 365
Gretna, Louisiana 70054
366-6491

BY: _____
NATHAN GREENBERG
ATTORNEY FOR PETITIONER

CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition has been mailed to Jack Grant and Cornelius Regan, of Grant & Barrow, 238 Huey P. Long Avenue, Gretna, Louisiana 70053, Attorney for Defendants, by depositing the same in the U. S. Mail, postage prepaid.

NATHAN GREENBERG

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
July 16, 1986

EUGENE SHEDRICK	*	CIVIL ACTION
VERSUS	*	NO. 86-72
DOROTHY D. DONNELY	*	SECTION "D" (1)

OPNION AND ORDER

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 2000(e)(2). With regard to the allegations pursuant to 42 U.S.C. § 2000(e)(2), Plaintiff's counsel concedes that this action is premature since he has not exhausted the administrative remedies as required and, accordingly, that portion of the complaint is dismissed, without prejudice, for lack of jurisdiction.

The allegations brought pursuant to § 1983 are concerned with Plaintiff's initial suspension without pay and ultimate dismissal by the Jefferson Parish School Board. A hearing was held on January 22, 1986 on Plaintiff's request for a Temporary Restraining Order and Preliminary Injunction and by Order of January 22, 1986, the Motion for Temporary Restraining Order and Preliminary Injunction were denied.

By stipulation of the parties, all remaining issues have been submitted to the court on the record which DATE OF ENTRY JULY 17,1986

includes several documents including various affidavits. The parties have advised the court that they have no desire to depose any of the affiants but wish to submit the case for trial on the merits on the record as it now stands. Additionally, at oral argument Plaintiff conceded that in view of the tenure hearing which has now been completed, his complaint is now limited to two issues: (1) Did Plaintiff receive a constitutionally acceptable pretermination hearing before he was suspended without pay on January 8, 1986? (2) Was the tenure hearing which was completed on June 23, 1986, provided in a timely fashion or was it so delayed as to amount to a denial of constitutional rights?

Plaintiff conceded that the tenure hearing itself met constitutional muster except for the alleged unreasonable delays in completing the hearing. Accordingly, he seeks as damages the pay which he was denied from January 8, 1986 to June 23, 1986, the day when the tenure hearing was completed.

A. PRE-TERMINATION HEARING

The record reflects that on January 8, 1986, Plaintiff received a copy of a letter from Mrs. Dorothy D. Donnelly, Principal at Riverside High School to Mr. Sidney Montet, Director of Personnel Relations for the Jefferson Parish School System describing specific charges concerning the conduct of Plaintiff. In that letter, Mrs. Donnelly recommended that Plaintiff be terminated as a teacher in the Jefferson Parish School System. A January 7, 1986 addendum to that letter noted that because of additional information learned by Mrs. Donnelly and further investigation, she recommended that effective January 8, 1986, Plaintiff be suspended without pay. Mr. Montet concurred and on

January 7, 1986, Mr. Anthony P. Chimento, Superintendent of the Jefferson Parish School Board, reviewed the documentation and concurred with the recommendations of Dorothy Donnelly and Sidney Montet and, accordingly, Plaintiff was suspended without pay effective January 8, 1986.

On January 22, 1986, pursuant to a collective bargaining agreement, Mr. Montet held a conference concerning the matter which also attended by Plaintiff, Mrs. Donnelly, and the Union representative. Mr. Montet read each charge contained in the December 18, 1985 letter from Mrs. Donnelly and asked Mrs. Donnelly to substantiate each charge. After she did so, Plaintiff was asked to give his version of each charge and submit any additional documentation he desired. During the conference, Plaintiff and/or the Union representative responded to the statements of Mrs. Donnelly and, additionally, the Union representative and Plaintiff made concluding statements at the end of the conference. Plainitff was advised that he could present any rebuttal he so desired and in fact he did so. He also questioned Mrs. Donnelly during the conference. The conference lasted almost three hours.

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. *See* Friendly, "*Some Kind of Hearing,*" 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *See Arnett v.*

> *Kennedy*, 416 U.S., at 170-171, 94 S.Ct., at 1652-1653 (opinion of POWELL, J.); *id.*, at195-196, 94 S.Ct., at 1664-1665 (opinion of WHITE, J.); *see also Goss v. Lopez*, 419 U.S., at 581, 95 S.Ct., at 740. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

See Cleveland Bd. of Educ. v. Loudermill, 105 S.Ct. 1487, 1495, 1496 (1985).

The pre-termination procedure described above was constitutionally adequate. To the extent Plaintiff alleges he was denied some other procedural right provided by Louisiana law, the proper forum for redress of that allegation is in the state court.

B. TIMELINESS OF TENURE HEARING

The record reflects that hearings were actually held on February 27, 1986, May 22, 1986, and January 23, 1986. Hearings were planned for other dates during the Spring of 1986 but had to be cancelled because of scheduling conflicts. At least one of the hearings was cancelled at the request of Mr. Shedrick's attorney. Apparently the hearings were thorough. Approximately twenty-five hours of testimony was taken. In *Cleveland Bd. of Educ. v. Loudermill, supra*, the court found:

> A 9-month adjudication is not, of course, unconstitutionally lengthy per se. Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The Chronology of the proceedings set out in the complaint, coupled with

> the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.

105 S.Ct. at 1496.

In the instant case, the record does not reflect purposeful delay or bad faith in completing the hearing. No prejudice to Plaintiff caused by the delay appears in the record. Considering all the cercumstances, the limited delay in completing the tenure hearing in this case was not unreasonable and is not unconstitutional per se. For the above reasons, Plaintiff's complaint will be DISMISSED at his costs.

New Orleans, Louisiana, this *16* day of July, 1986.

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
July 16, 1986

EUGENE SHEDRICK	*	CIVIL ACTION
VERSUS	*	NO. 86-72
DOROTHY D. DONNELY	*	SECTION "D" (1)

JUDGMENT

For reasons set forth in the court's Order dated July 16, 1986;

IT IS ORDERED that:

1. Plaintiff's Complaint seeking relief pursuant to 42 U.S.C. § 1983 is DISMISSED with prejudice at his costs.

2. Plaintiff's Complaint seeking relief pursuant to 42 U.S.C. § 2000(e)(2) is DISMISSED, at his costs, without prejudice, for lack of jurisdiction.

New Orleans, Louisiana, this *16* day of July, 1986.

/s/ illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY JULY 17,1986

APPENDIX B

MINUTE ENTRY
McNAMARA, J. **FIled**
August 13, 1986 **August 15, 1986**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EUGENE SHEDRICK	*	CIVIL ACTION
VERSUS	*	NO. 86-72
DOROTHY D. DONNELY	*	SECTION "D" (1)

Before the court is the Motion of Plaintiff, Eugene Shedrick, for a New Trial. Plaintiff, Mover herein, alleges that he was entitled to have counsel present at his pre-termination hearing, and yet was denied the assistance of counsel during that proceeding. Plaintiff points out that the union contract rules between the Jefferson Federation of Teachers and the Jefferson Parish School Board prohibit the right to counsel at a pre-termination hearing. *See,* Article 14A of union contract rules, attached to Plaintiff's Motion for a New Trial.

It is Plaintiff's contention that the aforenoted union contract rule prohibiting the assistance of counsel at a pre-termination hearing and the denial of his request for assistance of counsel at such proceeding constitute a clear violation of constitutional due process.

In support, Plaintiff, Mover herein, relies on the Fifth Circuit cases of *Potashnick v. Port City Construction*

DATE OF ENTRY AUGUST 15, 1986

Co., 609 F.2d 1101 (5th Cir. 1980) and *Mosley v. St. Louis Southwestern Railway*, 634 F.2d 942 (5th Cir. 1981), where the circuit court acknowledged that "[t]he right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process . . . ." *Mosley*, 634 F.2d at 945 (citing *Potashnick, supra).*

Defendants, Dorothy D. Donnelly, et al, have filed a memorandum in opposition. It is Defendants' position that in *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985) [hereafter "Loudermill"], the Supreme Court clearly stated that in the context of a pre-termination hearing, the essential requirements of due process are notice to the employee and an opportunity to respond.

A hearing was held in the above captioned matter on Wednesday, August 13, 1986. After considering the memoranda and argument of counsel and the applicable law, the court finds that the Supreme Court's decision in *Loudermill* clearly sets forth all the due process requirements in the context of a pre-termination hearing. The court further finds that legal representation at a pre-termination hearing is not part of the process to which an employee is due process requirements at the pre-termination hearing, as set forth in *Loudermill, supra.* This court emphasizes that it is dealing solely with the issue of assistance of counsel at the pre-termination hearing, not the post-termination hearing. During the latter proceeding, Plaintiff was afforded the assistance of counsel.

Based on the above;

IT IS ORDERED that Plaintiff's Motion for a New Trial be and is hereby DENIED.

* * * *

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3639

Summary Calendar

EUGENE SHEDRICK,

Plaintiff-Appellant,

versus

DOROTHY D. DONNELLY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(D.C. No. CA-86-0072-D)

(January 27, 1987)

Before GEE, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

Eugene Shederick, who was dismissed from his tenured position as a Louisiana public school teacher, appeals the district courts' dismissal of his 42 U.S.C. § 1983 action, dismissed on the basis that Mr. Shederick was afforded his rights to constitutional due process in all

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

hearings granted him, both pretermination and posttermination.

On appeal, Mr. Shedrick argues only one basis for reversal of the district court's dismissal of his claim: that he was denied the right of legal counsel at his pretermination hearing. The district court, in reviewing Mr. Shedrick's three-hour pretermination proceeding, held that the hearing was constitutionally adequate under *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985). We agree.

The Supreme Court made very plain in *Loudermill* that a pretermination hearing can meet constitutional requirements even though it is simple and procedurally lean. In Mr. Justice White's words, such a hearing "need not be elaborate." *Id.* at 1495. The essential requirements of due process, the Court explained, are notice and an opportunity to respond. Mr. Shedrick was entitled at his pretermination hearing to nothing more than notice of the charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story. These rights were fuly accorded Mr. Shedrick, and he does not say otherwise. As clear as a cloudless sky it follows that Mr. Shedrick did not have a constitutional right to legal counsel at his preterminating hearing.

In his brief, Mr. Shedrick states two other issues, but does not, in the slightest, argue either of them. They are without merit. His posttermination hearings were not unconstitutionally untimely. Finally, the defendants in this case clearly had the authority under state law to suspend Mr. Shedrick without pay before granting him a pretermination hearing. *Jones v. Jefferson Parish School Board*,

533 F. Supp. 816, 822 (E.D. La. 1982), (5th Cir. *aff'd* 688 F.2d 837 (5th Cir. 1982), *cert. denied*, 460 U.S. 1064 (1983).

The district court in this case correctly dismissed the complaint and is therefore

A F F I R M E D.

(2)

NO. 86-1651

In the Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE SHEDRICK,
Petitioner/Appellant,

VS.

DOROTHY D. DONNELLY, ET AL,
Defendants/Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18pp

QUESTION PRESENTED FOR REVIEW

Whether due process guarantees an employee the right to counsel at a pretermination hearing?

PARTIES

Eugene Shedrick

Dorothy D. Donnelly

Jefferson Parish School Board

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STATUTE

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STATEMENT OF THE CASE

On December 18, 1985, Dorothy Donnelly, Principal of Riverdale High School, wrote a memorandum to Sidney Montet, Director of Personnel for the Jefferson Parish School Board, recommending the termination of Eugene Shedrick, a teacher at Riverdale High School.

On January 7, 1986, Mrs. Donnelly amended her recommendation of termination to include suspension without pay effective January 8, 1986.

On January 8, 1986, Anthony Chimento, Superintendent of the Jefferson Parish School Board, notified Eugene Shedrick that he was being suspended without pay effective immediately and furthermore that he was recommending that he be terminated as a teacher with the Jefferson Parish School Board.

On January 9, 1986, Mr. Shedrick filed a complaint in the United States District Court against Dorothy Donnelly seeking damages and an injunction, prohibiting Mrs. Donnelly from disciplining him and from terminating him. On January 21, 1986, Mr. Shedrick filed an amended complaint asking for damages, an injunction and a temporary restraining order. Also at this time, Mr. Shedrick added the Jefferson Parish School Board as a party defendant. A hearing was held on this motion on January 22, 1986, at which time the motion for temporary restraining order and preliminary injunction were denied.

On January 22, 1986, Mr. Shedrick met with Sidney Montet, representatives of the personnel department, Dorothy Donnelly, and representatives of the Jefferson

Federation of Teachers, pursuant to a collective bargaining agreement in effect between the Jefferson Parish School Board and the Jefferson Federation of Teachers. At that meeting, Mr. Shedrick was informed of the charges made by Mrs. Donnelly and was given an opportunity to respond and present his side.

On January 23, 1986, Mr. Montet advised Mr. Shedrick that he was upholding the recommendation of Mrs. Donnelly and therefore recommended to the superintendent that he be terminated and suspended without pay effective January 8, 1986.

On January 28, 1986, Mr. Chimento advised Mr. Shedrick that he was upholding the recommendation of both Mr. Montet and Mrs. Donnelly and was going to notify the members of the Jefferson Parish School Board of his recommendation to terminate and suspend without pay pending a hearing before the Board in accordance with LSA-R.S. 17:433. That statute provides in part that:

> "A permanent teacher shall not be removed from office except upon written and signed charges of willful neglect of duty, or incompetency or dishonesty, or of being a member of or contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the state of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least twenty days in advance of the date of the hearing, the superintendant with approval of the school board shall furnish the teacher with a copy of the written charges. Such statement of charges shall include a complete and detailed list of the specific

> reasons for such charges and shall include but not limited to the following: date and place of alleged offense or offenses, names of individuals involved in or witnessing such offense or offenses, names of witnesses called or to be called to testify against the teacher at said hearing, and whether or not any such charges previously have been brought against the teacher. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the teacher. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction."

Subsequent to this, Mr. Shedrick requested a formal hearing before the board. These hearings were scheduled for February 26, 1986, February 27, 1986, March 3, 1986, March 24, 1986, March 25, 1986, April 15, 1986, May 22, 1986, and June 23, 1986. Of these scheduled hearings, only those scheduled for February 27, 1986, May 22, 1986, and June 23, 1986 were actually held. At least one of the cancelled hearings was at the request of Mr. Shedrick's attorney.

On June 13, 1986, Mr. Shedrick filed a second amended complaint seeking damages, an injunction and also a temporary restraining order, due to the fact that the Jefferson Parish School Board had not included his tenure hearing in what he felt to be a timely manner.

On June 23, 1986, the board voted to uphold the superintendent's recommendation of termination effective January 8, 1986.

The trial court ruled on July 16, 1986 that Mr. Shedrick received a constitutionally acceptable pretermination hearing and that the limited delay in conducting the tenure hearing before the board was not unreasonable nor was it inconstitutional per se. It had been conceeded by Mr. Shedrick's attorney that the claim for damages was pre mature at this time and therefore, the only issues before the court were the manner in which the pretermination hearing was conducted and the timeliness of the tenure hearings.

On July 22, 1986, Mr. Shedrick filed a motion for a new trial alleging that the pretermination hearing was unconstitutional since he was prohibited from having an attorney present with him. The collective bargaining agreement between the Jefferson Federation of Teachers, of which Mr. Shedrick was a member, and the Jefferson Parish School Board did not allow for an attorney to be present at a disciplinary hearing or at a pretermination hearing.

On August 15, 1986, trial judge ruled that legal representation at the pretermination hearing is not a part of the process to which an employee is due. The court also ruled that the hearings were conducted timely.

SUMMARY OF ARGUMENT

Mr. Shedrick, the complainant-appellant, argues that his due process rights were violated when he was prohibited from having counsel present at his pretermination hearing.

Due process requires that the individual effected

must be given some kind of notice and afforded some kind of hearing.

Prior to his meeting with Sidney Montet, Director of Personnel, Mr. Shedrick was furnished with a copy of the written changes against him.

On January 22, 1986, Mr. Montet held a conference with Mr. Shedrick, Mrs. Donnelly, representative of the personnel department and a representative of the Jefferson Federation of Teachers. At that time, Mr. Montet read each charge and asked Mrs. Donnelly to substantiate them. After doing so, Mr. Shedrick was given the opportunity to present his side of the story and submit any documentation that he desired. During the conference, Mr. Shedrick was allowed to question Mrs. Donnelly. At the conclusion of the conference, which lasted approximately three hours, both Mr. Shedrick and the union representative made closing statements. Additionally, Mr. Shedrick was advised that if he so desired he could present rebuttal evidence.

The Jefferson Parish School Board contends that Mr. Shedrick's pretermination due process rights were satisfied upon giving notice of the charges against him and giving him an opportunity to present his side of the story.

ARGUMENT

Eugene Shedrick, was suspended without pay on January 8, 1986. On January 22, 1986, a "pretermination" was held. Subsequent to that, in accordance with the provisions of LSA-R.S. 17:443, a tenure hearing was conducted before members of the Jefferson Parish School Board.

After his pretermination hearing but prior to the hearing before the board, in accordance with LSA-R,S, 17:443, Mr. Shedrick was again advised of the reasons for termination, given copies of all documentary evidence to be introduced in support of those charges and furnished with a list of all witnesses who would be called to testify against him.

At the board hearing, Mr. Shedrick was represented by counsel, had the opportunity to cross examine the witnesses against him, had the opportunity to introduce rebuttal evidence and had the opportunity to testify in his own behalf.

Mr. Shedrick is not alleging that the tenure hearing violated his due process. His main complaint is that his due process rights were violated at the pre termination hearing because he was prohibited from having an attorney present.

The facts in this case are similar to those in *Cleveland Board of Education v. Loudermill,* 105 S.Ct. 1487 (1985). In that case, both employees were allowed a pre termination hearing, a full administrative hearing and judicial review.

In discussing the pre termination hearing, the court in Loudermill stated that,

> "The foregoing considerations indicate that the pre termination "hearing," though necessary, need not be elaborate. We have pointed out that "the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the

subsequent proceedings." *Boddie v. Connecticut,* 401 U.S., at 378, 91 S.Ct., at 786. See *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894-895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). In general, "something less" than full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews v. Eldridge,* 424, U.S., at 343, 96 S.Ct., at 907. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the Goldberg Court itself pointed out, see id., at 264, 90 S.Ct., at 1018, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson,* 402 U.S., at 540, 91 S.Ct., at 1590.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See *Friendly, "Some Kind of Hearing",* 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to

present his side of the story. See *Arnett v. Kennedy*, 416 U.S., at 170-171, 94 S.Ct., at 1652-1653 (opinion of POWELL, J.); id., at 195-196, 94 S.Ct., at 1664-1665 (opinion of WHITE, J.); See also *Goss v. Lopez*, 419 U.S., at 581, 95 S.Ct., at 740. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

In the case of *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707 (8th Cir. 1986), RIggins was discharged as a custodial worker by the University of Nebraska. Prior to her termination, Ms. Riggins had a meeting with her supervisor concerning the incident that had led to her termination recommendation. At that meeting he advised her of the charges against her and gave her an opportunity to respond. Several days after this "pre termination hearing" Ms. Riggins was terminated.

Had Ms. Riggins decided to proceed, the University had a grievance procedure which could have been followed. There were three steps in the procedure. In the final step, a grievance committee composed of members from the three major types of staff considers evidence from both sides. Grievants are allowed to have lawyers, to look at all material in their personnel files, and to present witnesses in their own behalf.

The court in Riggins, citing *King v. University of Minnesota*, 774 F.2d 224, 228 (8th Cir. 1985) (quoting *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126, 128 (8th Cir. 1975), cert. denied, - U.S. -, 106 S.Ct. 1491, 89 L.Ed.2d 893 (1986), listed four requirements of due process, not including the opportunity to cross

examine or confront witnesses, in the discharge of tenured professor from a state university:

> "1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
>
> 2) notice of both the names of those who have made allegations against the teacher and the specific nature and factural basis for the charges;
>
> 3) a reasonable time and opportunity to present testimony in his or her own defense; and
>
> 4) a hearing before an impartial board or tribunal".

The court went on to say that, "If appellant (Riggins) had availed herself of the University's grievances procedure, she would have had all the protection listed in King and a fair opportunity to be heard. Due process in this context does not require more."

Mr. Shedrick was afforded every opportunity listed in both Riggins and King and now claims that one more requirement should be added, the right to counsel.

To justify this claim, he cites the case of *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980). In that case the trial judge had instructed the parties that once a witness took the stand, he was precluded from conferring with his attorney. The court held that, "the judge's rule pertaining to attorney-client communication impringed on Port City's due process right to retain counsel."

The main difference between Potashnick and the case at bar, is that the witness in Potashnick was denied counsel during the trial. In Mr. Shedrick's case, he was denied counsel at the pre termination hearing only. He was allowed and did not in fact have counsel present at the post termination hearing.

Mr. Shedrick cites *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) to support his contention that the right to counsel is present at administrative hearings. However, the facts in this case are quite distinctive from the case at bar.

In Goldberg, welfare recipients were denied assistance of counsel at administrative hearings which determined their eligibility for continued receipt of welfare payments. Additionally, the welfare recipients were not allowed to present their position orally, but rather, were allowed to present their position in writing or secondhand, through their case worker.

The court found that by terminating a welfare recipient's aid pending the resolution of the controversy of eligibility without due process, could deprive an eligible recipient of the very means by which to live while he waits.

The court felt that because of the welfare recipient's lack of education and inability to obtain professional assistance, he should be permitted counsel. In Mr. Shedrick's case, he was able to receive unemployment compensation benefits as well as earn income from other sources.

The due process requirements with respect to pre termination hearings have been defined by Loudermill as notice and as opportunity to respond.

In *Carter v. Western Reserve Psychiatric Habilitation,* 767 F.2d 270 (1985) the court held that "Wade's pre termination hearing was constitutionally sufficient in as much as he had received notice of the charge against him and was afforded an opportunity to rebut that charge.

In *Kelly v. Smith,* 764 F.2d 1412 (1985), the court went so far as to say that "Under Loudermill, it is clear that oral notice and an opportunity to respond orally is sufficient in the pre termination context."

Rogers v. Masem, 788 F.2d 1288 (8th Cir. 1985), relying on Loudermill, stated that "Prior to termination, the School Board was obligated to provide Rogers at a minimum notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

The Loudermill decision and those following it have said that the requirements necessary at a pretermination hearing are notice and an opportunity to respond. The only case requiring presence of counsel was Goldberg, for reasons discussed previously.

Mr. Shedrick was afforded all of the rights prescribed by law. He had an extensive pretermination hearing where he was able to hear the evidence against him, cross examine the witness, present his side of the story and rebut any unfavorable evidence.

CONCLUSION

It had been argued that the contractual provision between the Jefferson Parish School Board and the teachers, prohibiting counsel at pretermination hearings, should be stricken with nullity.

This Court has defined the requirements of due process, and the right to counsel does not appeal therein.

The fact that the union contract prohibited the right to counsel in a pretermination hearing is of no consequence, provided due process rights are satisfied.

In the instant case, all of the requirements of pretermination due process were met.

Therefore, it is submitted that the decision of the appellate court is correct and the writ should not be grnated.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been served upon:

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by depositing same in the United States mail, postage prepaid, this 13th day of May, 1987.

_____

JACK A. GRANT